

1998

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Recommended Citation

Ingram, Hanly A. (1998) "United States v. Tucker: Should Independent Counsels Investigate and Prosecute Ordinary Citizens?," *Kentucky Law Journal*: Vol. 86 : Iss. 3 , Article 7.
Available at: <https://uknowledge.uky.edu/klj/vol86/iss3/7>

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United States v. Tucker: Should Independent Counsels Investigate and Prosecute Ordinary Citizens?

BY HANLY A. INGRAM*

INTRODUCTION

The independent counsel statute¹ has become an ingrained feature of the American political culture.² Originally passed in response to Watergate and the Saturday Night Massacre,³ the statute codified the long-recognized principle that an institutional conflict of interest exists whenever the Department of Justice ("DOJ") investigates high-level executive branch officials. The public perception of this conflict of interest has been damaging to the institution of the presidency and to the

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¹ Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-99 (1994).

² The Independent Counsel ("IC") statute originally was enacted as the Ethics in Government Act of 1978, Pub. L.No. 95-521, 92 Stat. 1824. It has been reauthorized and re-enacted on three different occasions. *See* Pub. L. No. 97-409, 96 Stat. 2039 (1982); Pub. L. No. 100-191, 101 Stat. 1293 (1987); Pub. L. No. 103-270, 108 Stat. 731 (1994); *see also* Kenneth Jost, *Independent Counsel Disconnect: Some Critics Suggest Limiting Lengths and Targets of Investigations*, 83 A.B.A. J. 30, 30 (1997) ("It is now a fixture of American law. . . I don't think it's feasible to repeal it. . . ." (quoting former independent counsel Joseph diGenova)).

³ For the purposes of this Note, "Watergate" refers to the entire scope of the break-ins at the Democratic National Committee ("DNC") Headquarters located in the Watergate complex, the various investigations that followed, and the attempted cover-up of those break-ins. The Saturday Night Massacre was a specific event within the drama of Watergate. Generally, "Saturday Night Massacre" refers to the sequence of events surrounding the firing of Special Prosecutor Archibald Cox, the lead attorney investigating Watergate, by President Nixon, who had already been implicated in the scandal. *See infra* notes 17-29 and accompanying text.

nation's confidence in its governmental institutions. To ameliorate this damage, the independent counsel ("IC") statute provides for the appointment of supposedly independent attorneys to investigate alleged federal criminal acts whenever an institutional conflict of interest exists or could be perceived to exist.⁴ However, a recent opinion of the United States Court of Appeals for the Eighth Circuit, *United States v. Tucker*,⁵ dangerously extends the reach of an independent counsel's jurisdiction, ultimately allowing the vast resources of an IC to be used against ordinary citizens.⁶ This holding not only contravenes the original purpose of the IC statute, but is potentially patently unfair to the subject of the investigation.

Even at the time of Watergate, the notion of an investigator specifically appointed for the investigation of high-level executive officials was not a novel one. At various points in this nation's history, special prosecutors⁷ have been appointed by various administrations to investigate executive branch improprieties. However, the public perception of a conflict of interest within the DOJ became salient after the Saturday Night Massacre. These historical roots of the IC statute will be discussed in Part I of this Note. The statute itself covers nine sections of the United States Code and establishes a specific scheme for the appointment, authority, oversight, and removal of an IC. Part II will outline this statutory scheme and briefly discusses its use since 1978. Specific emphasis is placed on "referral jurisdiction,"⁸ the issue addressed by the court in *Tucker*. Part III will

⁴ See 28 U.S.C. § 591; *infra* notes 35-48 and accompanying text.

⁵ *United States v. Tucker*, 78 F.3d 1313 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

⁶ See *Statutory Interpretation - Ethics in Government Act - Eighth Circuit Holds Attorney General's Referral of Matters to Independent Counsel to be Nonreviewable - United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3257 (U.S. Oct. 7, 1996) (No. 95-2013), 110 HARV. L. REV. 793, 794 (1997).

⁷ The original Ethics in Government Act of 1978, *supra* note 2, referred to the investigating attorney as a "special prosecutor." However, public law 97-409 substituted "independent counsel" for "special prosecutor" "in order to reduce the stigma of, and remove the Watergate connotation from, a special prosecutor investigation and to more accurately describe the purpose of appointing an individual to conduct an investigation." S. REP. NO. 97-496, at 19-20 (1982), *reprinted in* 1982 U.S.C.A.N. 3537, 3555-56. For the purposes of this Note, "special prosecutor" will refer to a pre-Watergate prosecutor appointed pursuant to executive branch authority; "IC" will refer to an investigator appointed pursuant to the IC statute, including one appointed before the 1982 Amendments.

⁸ 28 U.S.C. § 594(e).

outline the *Tucker* decision, setting forth the rationale for each of the Court's holdings. Finally, the Conclusion of this Note will criticize these holdings, and their potential severity, on legal and policy grounds.

I. THE HISTORICAL DEVELOPMENT OF THE IC STATUTE

The institutional conflict of interest created when the DOJ investigates high-level executive branch officials was recognized long before Watergate.⁹ "On occasion during the history of our country, a special prosecutor has been appointed to investigate criminal wrongdoing by high-level Federal Government officials."¹⁰ The first occurred in 1875, "when President Ulysses S. Grant named John B. Henderson as special counsel to help prosecute the St. Louis Whiskey Ring¹¹ in which Grant's personal secretary and close friend, Orville E. Babcock, was allegedly involved."¹² Additionally, Presidents Theodore Roosevelt and Truman, acting through their Attorneys General, appointed special prosecutors to investigate and prosecute land fraud rings and Post Office corruption.¹³ Perhaps the most notable pre-Watergate special prosecutor was appointed by President Coolidge to investigate the infamous Teapot Dome scandal.¹⁴ Clearly, four

⁹ See S. REP. NO. 95-170, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4218.

¹⁰ S. REP. NO. 95-170, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4218. Such appointments are made pursuant to DOJ regulatory authority rather than statutory authority. See *infra* note 76 and accompanying text.

¹¹ The St. Louis Whiskey Ring involved a massive fraudulent tax scheme whereby millions of dollars of tax revenue were withheld from the Treasury Department through illegal fund-raising among whiskey distillers. See Grolier Online, *The American Presidency: The Whiskey Ring* (visited Jan. 10, 1998) <<http://www.grolier.com/presidents/ea/side/whisring.html>>.

¹² TERRY EASTLAND, *ETHICS, POLITICS AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989*, at 8 (1989) (citing David A. Logan, *Historical Uses of a Special Prosecutor: The Administrations of Presidents Grant, Coolidge and Truman*, 7 The Library of Congress, Congressional Research Service (Nov. 23, 1973)); see also S. REP. NO. 95-170, *supra* note 10, at 2.

¹³ See EASTLAND, *supra* note 12; see also Peter W. Rodino, Jr., *The Case for the Independent Counsel*, 19 SETON HALL LEGIS. J. 5 n.6 (1994) (discussing the Teapot Dome scandal and investigation into criminal misconduct within the Bureau of Internal Revenue and the DOJ during the Truman administration).

¹⁴ See EASTLAND, *supra* note 12, at 8 (stating that this appointment "still stands as the only instance ever of special counsel appointed and confirmed by the Senate"). "Teapot Dome" refers to an illegal lease of U.S. naval oil reserves by President Harding's Secretary of the Interior, Albert F. Hall. See JUDY JONES &

appointments over a period of more than seventy-five years does not establish a large volume of convention from which the IC statute developed. However, "[t]he resort to outside counsel in these instances established a tradition within the traditional politics of ethics of naming special prosecutors in certain, exceptional circumstances."¹⁵

The summer of 1997 marked the twenty-fifth anniversary of the Watergate break-ins.¹⁶ Of course, it was during the second break-in that the burglars twice put tape around an automatic lock on a door latch, leading to their discovery by a Watergate security guard. What was first deemed a "third-rate burglary" by White House Press Secretary Ron Ziegler, erupted into the most devastating political scandal in this country's history. Initially the Watergate investigation was entrusted to the DOJ, but as the cover-up was revealed and public pressure mounted, Congress increasingly called for the appointment of a special prosecutor. Such an appointment was in fact made a condition of the Senate confirmation of Elliot L. Richardson as Attorney General.¹⁷ After his confirmation, Richardson appointed his former professor of constitutional law at Harvard, Archibald Cox, as special prosecutor. This appointment was made with various assurances of independence, including wide jurisdiction, limited interference by the DOJ, and a removal power limited only to "extraordinary improprieties."¹⁸ These limitations, however, were soon ignored by the President.

After Alexander Butterfield, Nixon's former assistant, disclosed the existence of Nixon's secret taping system in the White House offices, Cox

WILLIAM WILSON, AN INCOMPLETE EDUCATION 49-51 (1987).

¹⁵ EASTLAND, *supra* note 12, at 8.

¹⁶ There were actually two different break-ins at the DNC headquarters in the Watergate office complex. The purpose of the first was to install bugging devices. The second, during which the burglars were arrested, was to relocate the bugging devices to procure better information. See Samuel Dash, *Congress' Spotlight on the Oval Office: The Senate Watergate Hearings*, 18 NOVA L. REV. 1719, 1720-21 (1994).

Much of this brief Watergate chronology is gleaned from a course entitled "Governmental Crises and the Legal System" taught in the spring semester of 1996 at Duke University by David M. Dorsen, assistant chief counsel to the Senate Select Committee on Presidential Campaign Activities (Ervin Committee). This Note is far too short for any meaningful discussion of Watergate, but countless volumes have been written on the subject. Those referenced herein are particularly insightful.

¹⁷ See SAM ERVIN, JR., THE WHOLE TRUTH: THE WATERGATE CONSPIRACY 112 (1980).

¹⁸ *Id.* at 116.

quickly sought the discovery of the tapes that it produced. Nixon defended on the ground of executive privilege, a defense that ultimately was rejected by the United States Supreme Court in *United States v. Nixon*.¹⁹ In the face of a Supreme Court-endorsed subpoena to comply with the order for production of the tapes, Nixon, fearing exposure of the cover-up, still refused to produce the tapes, offering instead edited transcripts. Cox refused to agree to this compromise, and the stage for the Saturday Night Massacre was set. Nixon, infuriated by Cox's defiance, ordered his removal. Attorney General Richardson first refused to fire Cox, then resigned, as did Deputy Attorney General William D. Ruckelshaus.²⁰ Finally, Solicitor General Robert H. Bork obeyed Nixon's order and removed Cox as Watergate Special Prosecutor.²¹ Dubbed the "Saturday Night Massacre," this sequence of events clearly showed Nixon's willingness to abuse his political power.

Public reaction to the Saturday Night Massacre was both swift and remarkable. The American public displayed its penchant for inventive political participation by driving in front of the White House and honking in such great numbers that Nixon was forced to retreat to Camp David.²² Additionally, Washington was flooded with "'the heaviest concentrated volume [of telegrams] on record,' according to Western Union."²³ "In volume and intensity of denunciation this outcry of the people was without the faintest precedent in the annals of the country."²⁴ Soon thereafter, twenty-two Articles of Impeachment were introduced in the House of Representatives,²⁵ three of which eventually passed.²⁶ Watergate and the

¹⁹ *United States v. Nixon*, 418 U.S. 683 (1974).

²⁰ See ERVIN, *supra* note 17, at 239.

²¹ See *id.* at 242. This was not the first instance of the removal of a special prosecutor. President Grant fired special prosecutor Henderson for being "too aggressive in his pursuit of Babcock." EASTLAND, *supra* note 12, at 14. Additionally, President Truman's Attorney General, J. Howard McGrath, fired special prosecutor Newbold Morris when Morris's inquiry "extended into the Justice department[.]" *Id.* at 16 n.11. Truman then quickly fired McGrath and "named a new Attorney General, who in turn named a new special prosecutor." *Id.*

²² See JAMES DOYLE, NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI 205 (1977).

²³ RICHARD BEN-VENISTE & GEORGE FRAMPTON, JR., STONEWALL, THE REAL STORY OF THE WATERGATE PROSECUTION 150 (1977) (quoting a Western Union representative).

²⁴ ERVIN, *supra* note 17, at 242.

²⁵ See BEN-VENISTE & FRAMPTON, *supra* note 23, at 150.

²⁶ See ERVIN, *supra* note 17, at 282.

Saturday Night Massacre, coupled with the perceived governmental dishonesty during the Vietnam era, devastatingly eroded the public's faith in government and governmental institutions.²⁷ Various studies show that the decline of the public's faith in government "became marked during and following the Watergate crisis."²⁸ Congress sought to ameliorate this damage through various legislative acts, particularly the Ethics in Government Act of 1978.²⁹

The stated purpose of the Ethics in Government Act of 1978 was to "preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government."³⁰ A distinct element of the public sentiment created by Watergate is that the presidency is perhaps not sufficiently accountable. The Saturday Night Massacre clearly displayed the institutional conflict of interest that arises when the DOJ attempts to investigate high-level executive branch officials. This conflict has been stated in various ways. "[T]he Department of Justice has difficulty investigating and prosecuting crimes allegedly committed by high-ranking executive branch officials because the Department as an institution [is] poorly equipped to handle cases involving senior executive branch officials."³¹ The Court of Appeals for the District of Columbia Circuit has noted:

Thus, fifty years of the nation's history involving the Teapot Dome, Truman Administration, and Watergate scandals, has demonstrated a generally recognized inability of the Department of Justice and the

²⁷ See Robert A. Rankin, *Watergate Scandal Still Echoes Through Politics, Government, Media Today*, PORTLAND OREGONIAN, June 17, 1997, at A10 ("The public cynicism toward political leaders and institutions that we see today very much has its roots in the dual tragedies of Watergate and the Vietnam era." *Id.* (quoting Mark Rozell, professor of government at American University)).

²⁸ KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 44 (1992) (discussing a study by the Center for Political Studies showing that "[t]he sharpest increase [in percentage of respondents who felt that government could not be regularly trusted to do what was right] (of 14 percent) occurred between 1972 and 1974, the years that the Watergate scandal was unfolding").

²⁹ See *supra* note 2.

³⁰ S. REP. NO. 95-170, *supra* note 9, at 1. Of course, one has to question the efficacy of this Act, given that confidence in government continues to plummet. See *Confidence in Government Poll*, ROCKY MOUNTAIN NEWS (Denver, Co.), Oct. 13, 1996, at 6A.

³¹ S. REP. NO. 95-170, *supra* note 9, at 3.

Attorney General to function impartially with full public confidence in investigating criminal wrongdoing of high-ranking government officials of the same political party. . . . Accordingly, Congress in 1978, acting to regularize the manner of handling such major conflict of interest problems, enacted the Special Prosecutor provisions of the Ethics in Government Act.³²

This conflict of interest was perhaps most thoughtfully described by Archibald Cox when discussing one's ability to investigate one's superior. "The pressures, the divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is essential."³³ To resolve this conflict of interest, Congress created statutory authority for the appointment of ICs in sensitive cases.

II. THE SCHEME AND IMPLEMENTATION OF THE IC STATUTE³⁴

A. *The Statutory Scheme*

The IC statute creates a two-stage process – review by the Attorney General to determine if an IC is needed and, if so, the IC's investigation and prosecution of the matter in question.³⁵ The first step in determining if the appointment of an IC is warranted is the Attorney General's receipt of

³² *In re Olson*, 818 F.2d 34, 42 (D.C. Cir. 1987).

³³ S. REP. NO. 95-170, *supra* note 9, at 5 (quoting former special prosecutor Archibald Cox during consideration of S. 495, 94th Cong., regarding the "investigation and prosecution of crimes which might involve the Whitehouse." *Id.*).

³⁴ This Note is far too limited in scope to describe all aspects of the nine code sections comprising the IC statute. However, several useful summaries exist. See S. REP. NO. 103-101, at 8-9 (1994), *reprinted in* 1994 U.S.C.C.A.N. 748, 752-753; Martin B. Goldberg, *Conflicts of Interest and the Independent Counsel Law*, 25 AM. CRIM. L. REV. 370, 375-80 (1987); Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 11-13 (1990); Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 465-69 (1996); Alexander I. Tachmes, *Independent Counsels Under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power?*, 42 U. MIAMI L. REV. 735, 739-43 (1988).

³⁵ See S. REP. NO. 103-101, *supra* note 34, at 9.

evidence of federal criminal acts. The Attorney General must then assess that evidence, and may continue to investigate only if she determines within thirty days³⁶ that the evidence is both specific and credible.³⁷ If the Attorney General makes such a determination, she must then "commence a preliminary investigation with respect to that information."³⁸

Given specific and credible evidence, a preliminary investigation is appropriate in two situations. The first is when there are alleged violations of federal criminal laws by persons with whom the DOJ is deemed to have an institutional conflict of interest.³⁹ The Senate, in considering the original provisions of the Ethics in Government Act, stated:

Up to this point, this chapter has identified certain positions, the holders of which have such a relationship to the Attorney General and the President that there is a conflict of interest or the appearance thereof if the Department of Justice conducts a criminal investigation of an individual occupying any of these identified positions.⁴⁰

Covered persons include the President, Vice-President, certain high-level executive branch officials, certain DOJ officials, CIA directors, the Internal Revenue Commissioner, and certain campaign directors of a presidential campaign.⁴¹ The second situation in which the IC statute applies is when "investigation or prosecution of a person by the Department of Justice may result in personal, financial, or political conflict of interest[.]"⁴² This obviously opens the door to preliminary investigations by the Attorney General when investigations by the DOJ of the same persons would not *actually* present a conflict of interest.⁴³ Through this door, another is

³⁶ See 28 U.S.C. § 591(d)(2) (1996).

³⁷ See *id.* § 591(d)(1)(A), (B).

³⁸ *Id.*

³⁹ See *id.* § 591(b). It should be noted that Congress decides with whom the DOJ has a conflict of interest. See *id.* § 595(a).

⁴⁰ S. REP. NO. 95-170, *supra* note 9, at 132-33.

⁴¹ See 28 U.S.C. § 591(b)(1)-(7).

⁴² 28 U.S.C. § 591(c)(1). This has been called a catch-all provision. See generally Dan W. Reicher, *Conflict of Interest in Inspector General, Justice Department, and Special Prosecutor Investigations of Agency Heads*, 35 STAN. L. REV. 975 (1983).

⁴³ Indeed, Congress has recognized that "[t]he appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself." S. REP. NO. 95-170, *supra* note 9, at 6.

opened for the appointment of an IC when no real conflict of interest exists. However, it is clear that perceived conflicts (or, more accurately, misperceived conflicts) must be guarded against as well.⁴⁴

The Attorney General's preliminary investigation must be conducted according to specific statutory rules.⁴⁵ The purpose of this investigation is to determine whether further investigation is warranted. If so, the Attorney General must apply to a special division of the United States Court of Appeals for the D.C. Circuit ("Special Division") for the appointment of an IC.⁴⁶ The Special Division is comprised of three judges from the D.C. Circuit who serve two-year terms.⁴⁷ The Special Division has the sole power to appoint an IC pursuant to an Attorney General's request.⁴⁸

Perhaps the most important provisions of the IC statute for the purposes of this Note are those covering the prosecutorial jurisdiction of an IC. Specifically, the Special Division has the sole power to grant the IC her initial prosecutorial jurisdiction.⁴⁹ This grant must be such that it "assure[s] that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter."⁵⁰ Clearly, this broad statutory grant enables the Special Division to vest a great deal of authority in the IC. Additionally, if the Attorney General feels that a broader grant of jurisdiction is required, she may request the Special Division to expand the original prosecutorial jurisdiction.⁵¹ These provisions combine to allow the IC a great deal of latitude in her investigation.

⁴⁴ One could argue that the IC statute is itself based upon a misperception. In other words, despite the Saturday Night Massacre, and despite the institutional difficulties of DOJ investigations of high-level executive branch crimes, the then-existing system of accountability worked successfully. Congressional investigation, non-statutory special prosecutors, media scrutiny, public scrutiny, and threatened impeachment all acted in concert to bring the facts of Watergate to light. See O'Sullivan, *supra* note 34, at 476 (arguing that Watergate proved the efficacy of the above-listed mechanisms).

⁴⁵ See 28 U.S.C. § 592. The specific conduct in which an Attorney General should engage during this preliminary investigation exceeds the scope of this Note.

⁴⁶ See *id.* § 592(c).

⁴⁷ See *id.* § 49.

⁴⁸ See *id.* § 592(c).

⁴⁹ See *id.* § 593.

⁵⁰ *Id.* § 593(b)(3).

⁵¹ See *id.* § 593(c).

The type of jurisdiction at issue in *United States v. Tucker*⁵² is denominated "referral jurisdiction."⁵³ Referral jurisdiction allows an IC to investigate alleged crimes relating to his original jurisdictional grant.⁵⁴ Because *Tucker* turned on this provision, and it therefore is the main focus of this Note, it is set out in full:

(e) Referral of other matters to an independent counsel. – An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.⁵⁵

As discussed below, this section hardly constitutes a model for statutory drafting. Consequently, its true meaning has been shaped by judicial interpretation.⁵⁶ Clearly, it allows for referral jurisdiction by either the Special Division or the Attorney General upon request by the IC. Additionally, it empowers an Attorney General to refer a matter to an existing IC absent any request by the IC. As discussed below in Parts III and IV, courts have generously read into this provision a great deal of referral power.⁵⁷

B. The Implementation of the IC Statute

Since the enactment of the IC statute, its constitutionality has been litigated several times, most notably in *Morrison v. Olson*.⁵⁸ *Olson* arose

⁵² *United States v. Tucker*, 78 F.3d 1313 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

⁵³ See 28 U.S.C. § 594(e).

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ See *infra* Part IV for a detailed discussion of this particular provision.

⁵⁷ The remaining sections of the IC statute, 28 U.S.C. §§ 596-599, are largely immaterial for the purposes of this Note.

⁵⁸ *Morrison v. Olson*, 487 U.S. 654 (1988).

out of the investigation by IC Alexia Morrison of alleged false and misleading testimony given by Theodore B. Olson (formerly Assistant Attorney General for the Office of Legal Counsel) during a House Judiciary Committee investigation.⁵⁹ Olson and two other subjects of the investigation challenged the IC statute as violating the Appointments Clause,⁶⁰ Article III,⁶¹ and the separation-of-powers doctrine.⁶² Dealing with each challenge in turn, the United States Supreme Court first held that because ICs are inferior to the Attorney General, having limited duties and jurisdiction, they are inferior officers under the Appointments Clause and thus may be appointed by the judiciary.⁶³ In rejecting the argument that "the powers vested in the Special Division by the [IC] Act conflict with Article III of the Constitution,"⁶⁴ the Court held that the IC's powers do not constitute "executive or administrative duties of a nonjudicial nature [that] may not be imposed on judges holding office under Art. III of the Constitution."⁶⁵ Finally, the Court held that "the Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch."⁶⁶ By upholding the constitutionality of the IC statute, the *Olson* Court permitted the statute's continued implementation.

The IC statute is often criticized as being an overused political tool.⁶⁷ This argument has some force to it, as revealed by the increasing frequency with which ICs are appointed. During the statute's first four years, twelve preliminary investigations were conducted, three ICs were appointed, and there were no indictments.⁶⁸ From 1982 to 1987, the next five years of the

⁵⁹ The Judiciary Committee was investigating "efforts of the EPA and the Land and Natural Resources Division of the Justice Department to enforce the 'Superfund Law.'" *Id.* at 665.

⁶⁰ U.S. CONST. art. II, § 2, cl. 2.

⁶¹ *Id.* art. III.

⁶² For a discussion of this doctrine, see *Morrison*, 487 U.S. at 677.

⁶³ See *id.* at 671-77.

⁶⁴ *Id.* at 677.

⁶⁵ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 123 (1976)).

⁶⁶ *Id.* at 697.

⁶⁷ See Thomas S. Martin, *Independent Counsel - Checks and Balances*, 58 GEO. WASH. L. REV. 536 (1990) (advocating various reforms of the IC statute limiting the IC's powers and availability, including reducing the number of officials covered by the act.); O'Sullivan, *supra* note 34, at 463 (discussing overuse); Jost, *supra* note 2 (discussing limiting the number of officials covered by the IC statute).

⁶⁸ See S. REP. NO. 103-101, *supra* note 34, at 13.

statute's operation, eleven preliminary investigations were conducted, resulting in the appointment of seven ICs.⁶⁹ These appointments were more productive, resulting in several indictments and convictions, most notably those involving the Iran-Contra scandal.⁷⁰ The period 1987-1992 produced fourteen preliminary investigations resulting in the appointment of three ICs, whose investigations ended in varying success, including some indictments and convictions.⁷¹ Of course, the success of an independent counsel investigation is not measured solely by its outcomes; it is often more important merely to bring the facts to light.

Each reauthorization of the statute⁷² extends the life of the statute for only five years. In 1992, the statute was allowed to expire without reauthorization largely "due to opposition by Republican critics of Judge Lawrence Walsh's Iran-Contra investigation."⁷³ The expiration of the statute, however, did not close three pending IC investigations.⁷⁴ While the statute was not in effect, Attorney General Janet Reno was faced with widespread political pressure to appoint a special prosecutor to investigate Whitewater and the death of former White House Counsel Vincent Foster.⁷⁵ "Attorney General Reno, who is a supporter of the IC statute and wanted to await its reauthorization, finally acceded to Republican demands and appointed an IC [Robert B. Fiske, Jr.] pursuant to DOJ regulations."⁷⁶

⁶⁹ See *id.*

⁷⁰ See *id.* Generally, "Iran-Contra" refers to the sequence of events surrounding the "U.S. Government involvement with the Nicaraguan contras during a prohibition on military aid from October 1984 to October 1986." LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS: INVESTIGATIONS AND PROSECUTIONS 1 (1993). Essentially this involved a diversion of funds collected from the sales of arms to Iran to support the contras in Nicaragua. See *id.*

⁷¹ See S. REP. NO. 103-101, *supra* note 34, at 14.

⁷² See *supra* note 2 for a general discussion of reauthorizations of the Ethics in Government Act.

⁷³ O'Sullivan, *supra* note 34, at 471. Republican critics accused Judge Walsh of pursuing a personal vendetta against party members allegedly involved in the Iran-Contra scandal. See Jerry Seper, *Prosecutors' Politics Show in Party Favors*, WASH. TIMES, Dec. 13, 1992, at A3.

⁷⁴ See S. REP. NO. 103-101, *supra* note 34, at 8.

⁷⁵ See O'Sullivan, *supra* note 34, at 471; see also LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 74-75 (4th ed. 1997).

⁷⁶ O'Sullivan, *supra* note 34, at 471 n.40 (citing 28 C.F.R. § 600.1 (1995) ("regulatory authority for appointment of independent counsel")). This is the same type of authority pursuant to which special prosecutors were appointed before the

"On June 30, 1994, the IC statute, which had by now, not surprisingly, gained Republican converts, was reauthorized."⁷⁷ Shortly thereafter, in order to avoid any perceived impartiality caused by Fiske's continued investigation despite authority originally emanating from the DOJ, the Special Division appointed a new IC, Kenneth Starr.⁷⁸ Since the statute's reauthorization, four ICs have been appointed by the Special Division,⁷⁹ including Kenneth Starr. Furthermore, ever-increasing calls from congressional leaders for the appointment of ICs demonstrate that not only have ICs become extensively used, they have become political ammunition. For instance, many politicians have recently demanded the appointment of an IC to investigate alleged fund-raising abuses by the Clinton campaign in the 1996 Presidential election.⁸⁰ Given the frequency of IC appointments, many critics argue that the statute is an overused political tool.⁸¹

III. THE *TUCKER* DECISION

Tucker arose out of the Whitewater investigation by IC Kenneth Starr.⁸² The initial investigation (by Robert Fiske pursuant to regulatory authority) was deemed to warrant an independent counsel to determine:

"whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with

IC statute was enacted.

⁷⁷ *Id.* at 472.

⁷⁸ See *United States v. Tucker*, 78 F.3d 1313, 1315 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996); see also discussion *infra* Part IV.

⁷⁹ See Toni Locy, *Keeping Tabs on Independent Counsels; Probes of Clinton, Aides Have Cost \$36 Million*, WASH. POST, Apr. 4, 1997, at A19.

⁸⁰ See Lee Davidson, *Hatch Makes Case for Independent Probe*, DESERET NEWS (Salt Lake City, Utah), Apr. 30, 1997, at A01; see also Mary Ann Akers, *Reno Decision Nets Summons to Hill by GOP: Ruling Called Protection of Clinton*, THE WASH. TIMES, Dec. 3, 1997, at A8; Neil A. Lewis, *Republicans React Quickly and Angrily to Reno Move*, N.Y. TIMES, Dec. 3, 1997, at A1.

⁸¹ See *supra* note 67 and accompanying text.

⁸² Due to ever-increasing media frenzy and scrutiny of IC investigations, Whitewater has been widely chronicled. The extensive and as-yet undetermined facts of Whitewater are not critical to this Note, as it is mainly concerned with the potential future impact of *Tucker*, rather than the impact of *Tucker* on the defendants involved in Whitewater.

Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.”⁸³

During the course of his investigation, Starr came across evidence of violations of federal criminal law by former “Governor of Arkansas Jim Guy Tucker, his Little Rock lawyer John H. Haley, and his San Francisco business partner William J. Marks, Sr.,”⁸⁴ who comprised the defendants named in *Tucker*.

Pursuant to the IC statute,⁸⁵ Starr sought referral jurisdiction from Attorney General Reno, which was granted on the basis that “this matter . . . [is] related to the OIC’s investigation.”⁸⁶ Additionally, Starr sought referral jurisdiction from the Special Division, which was granted by an order of referral that “precisely track[ed] the Attorney General’s September 2, 1994, referral to the OIC of all investigative and prosecutorial jurisdiction over federal criminal matters relating to the [Landowner’s Management System] bankruptcy.”⁸⁷ After an investigation pursuant to this authority, the *Tucker* defendants were indicted by a federal grand jury for the Eastern District of Arkansas for “tax fraud; bankruptcy fraud; making false material statements for the purpose of influencing [Capital Management Services], a federally licensed management company in Arkansas; and conspiracy to commit various of these acts.”⁸⁸

Defendant Tucker “moved to dismiss the indictment . . . on the ground that the Independent Counsel exceeded his jurisdiction.”⁸⁹ Starr countered by arguing “(1) that the indictment of the defendants in this case [fell] within the scope of his prosecutorial jurisdiction; and (2) that even if it [did] not, the referral of the matter to him, as independent counsel, is not subject to judicial review.”⁹⁰ The district court, Judge Henry Woods presiding, agreed with Tucker and quashed the indictments. By holding that

⁸³ *Tucker*, 78 F.3d at 1315 (quoting *In re Madison Guar. Sav. & Loan Ass’n*, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994)).

⁸⁴ *Id.* at 1316.

⁸⁵ See *supra* notes 53-57 and accompanying text (discussing 28 U.S.C. § 594(e)).

⁸⁶ *Tucker*, 78 F.3d at 1315-16 (discussing responsive letter from the Acting Assistant Attorney General dated Sept. 2, 1994).

⁸⁷ *Id.* at 1316.

⁸⁸ *Id.*

⁸⁹ *United States v. Tucker*, 898 F. Supp. 654, 655 (E.D. Ark. 1995), *rev’d*, 78 F.3d 1313 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

⁹⁰ *Id.*

the IC lacked prosecutorial jurisdiction,⁹¹ Judge Woods recognized a right to judicial review of a referral jurisdiction grant.

Judge Woods was shocked at the idea that a person could be subject to such an investigation without redress in the courts to determine if it was jurisdictionally permitted. He said, "I cannot accept the proposition that a citizen can be put on trial in my court for a loss of his liberty and that no court has the power to determine whether there is jurisdiction to proceed in the matter."⁹² Additionally, Judge Woods relied on some language from *Morrison v. Olson* to hold "that the matters contained in Count III of the indictment, which the Attorney General has referred to the Independent Counsel, are completely unrelated to the Clintons and McDougal."⁹³ Thus, the indictments fell outside of IC Starr's jurisdiction and were dismissed.⁹⁴

On appeal, the United States Court of Appeals for the Eighth Circuit reversed, holding that a grant of referral jurisdiction is nonreviewable.⁹⁵ The court went on to say that even if it were reviewable, there was no abuse of discretion by the Attorney General because "the subject matter of the referral jurisdiction in this case [was] 'related' to the Independent Counsel's original prosecutorial jurisdiction"⁹⁶ In holding the referral issue to be nonreviewable, the court analogized to normal prosecutorial discretion, stating that "prosecutorial decisions of the nature here in question – who should be prosecuted and for what alleged crimes – have long been committed to the discretion of the prosecutor."⁹⁷ Additionally, the court reviewed the legislative history of the 1987 amendments⁹⁸ and determined that "the Attorney General's decisions under the independent counsel law are nonjusticiable."⁹⁹ Thus, two different rationales were offered for holding referral decisions to be nonreviewable.

Alternatively, the court held that even if review of such decisions is allowed, the "relatedness" requirement of § 594(e) was satisfied.¹⁰⁰ Noting that referral jurisdiction may not have even been necessary given the broad

⁹¹ See *id.* at 663.

⁹² *Id.* at 658.

⁹³ *Id.*

⁹⁴ *Id.* at 663.

⁹⁵ See *Tucker*, 78 F.3d at 1316.

⁹⁶ *Id.* at 1322.

⁹⁷ *Id.* at 1317.

⁹⁸ See *supra* note 2.

⁹⁹ *Tucker*, 78 F.3d at 1318.

¹⁰⁰ See *id.* at 1322.

original jurisdictional grant by the Special Division,¹⁰¹ the court gave a liberal reading to the “relatedness” requirement of § 594(e). Rejecting an argument based on language in *Morrison v. Olson*, the court held that all that is required for an Attorney General’s referral decision under the “relatedness” requirement is a “procedural and factual link between the OIC’s original prosecutorial jurisdiction and the matter sought to be referred.”¹⁰² Applying this rule to the facts, the court held that witness overlap, defendant overlap, and factual relatedness between McDougal and Tucker and between Capital Management Services and Madison Guaranty easily satisfied the “relatedness” requirement.¹⁰³

Similarly, the court rejected Tucker’s contention that he and the other defendants did not fall “within the meaning of § 591 who can be investigated by the OIC, and therefore they cannot be prosecuted by the OIC for wrongdoing.”¹⁰⁴ This argument was rejected on the basis that referral jurisdiction need not relate to a covered person and because the original grant of jurisdiction was made pursuant to the catch-all provision of § 591(c).¹⁰⁵ Finally, the court rejected the argument that the referral jurisdiction granted to Starr was more accurately described as “expanded jurisdiction,”¹⁰⁶ and was therefore unavailable to Starr because he did not apply for such jurisdiction.¹⁰⁷ The court reasoned that this argument was rendered moot due to the “decision that referral was proper because the referred matter is related to the Independent Counsel’s prosecutorial jurisdiction.”¹⁰⁸ Thus, *Tucker* allows a great deal of discretion to be exercised by both the Attorney General and an IC when dealing with matters of referral jurisdiction.

¹⁰¹ Along with the jurisdictional language that *Tucker* quoted, *see supra* text accompanying note 83, the original jurisdictional grant contained the following language: “‘jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matter described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters.’” *Tucker*, 78 F.3d at 1315 (quoting *In re Madison Guar. Sav. & Loan Ass’n*, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994)).

¹⁰² *Tucker*, 78 F.3d at 1321.

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 1321-22.

¹⁰⁵ *See id.* at 1322; *see also supra* note 42 and accompanying text.

¹⁰⁶ *See Tucker*, 78 F.3d at 1322.

¹⁰⁷ *See id.* Section 593(c) allows the Special Division to expand the IC’s jurisdiction if the IC receives information about criminal violations by persons under § 591 who are not otherwise covered by the original jurisdictional grant.

¹⁰⁸ *Id.*

IV. ASSESSING THE *TUCKER* DECISION

Tucker's broad grant of investigatory power, in light of the well-documented purposes and implementation of the IC statute, is potentially patently unfair to ordinary citizens who might be subjected to independent counsel review under a grant of referral jurisdiction. "The *Tucker* decision is unprecedented because it permits an IC to prosecute ordinary citizens for crimes that are not factually related to the reason for the ICs appointment – that is, to the alleged illegal activity of a high-ranking executive branch official."¹⁰⁹ For several legal and policy reasons, *Tucker* was a poorly reasoned opinion with potentially disastrous implications. The prosecutorial discretion analogy employed by the court simply missed the issue at hand. Furthermore, the reliance on legislative history, although persuasive, was not entirely dispositive because the legislature did not explicitly state the principles on which the court relied for its holding. The real danger of *Tucker* is that it will open the floodgates for frequent IC investigation and prosecution of ordinary citizens. This was not intended by the IC statute and would impose severely unreasonable burdens on such investigatory targets without even permitting those individuals to object on jurisdictional grounds. Clearly, such a result is patently unfair to those against whom *Tucker* may be used.

A. Reviewability

1. *The Prosecutorial Discretion Analogy*¹¹⁰

The analogy drawn by the court to a normal prosecutor's exercise of his discretion to determine whether to prosecute misses the point of *Tucker's* motion to dismiss the indictment against him and the point of the IC statute. Rather than the traditionally discretionary issue of *who is to be prosecuted*, the main issue under the IC statute is *who is to prosecute*? In other words, the court mischaracterized the issue before it. Noting that prosecutorial decisions "of the nature here in question – who should be prosecuted and for what alleged crimes –" fall within the realm of prosecutorial discretion,¹¹¹ the court stated, "In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. . . . This broad discretion rests largely on the recognition that the

¹⁰⁹ See *Statutory Interpretation*, *supra* note 6, at 796.

¹¹⁰ See *Tucker*, 78 F.3d at 1316-17.

¹¹¹ *Id.* at 1317.

decision to prosecute is particularly ill-suited to judicial review.’”¹¹² Admittedly, the issue of who to prosecute should be nonreviewable, but that is not the issue that was before the court.

In fact, the court hinted at this issue-dodging, stating, “Although prosecutorial discretion is not the precise issue here, we do not see any reason to believe that the Attorney General’s referral decision is any more subject to judicial review than the usual prosecutorial decisions.”¹¹³ Truthfully, there are many reasons to distinguish between referral decisions and ordinary prosecutorial decisions. The first, and most obvious, is that an IC is not a typical prosecutor. An IC is a specially created officer for a special situation. The court admitted as much by stating, “An independent counsel, of course, is not an ordinary United States attorney.”¹¹⁴ Given the complex statutory scheme governing when and how ICs should be appointed and removed, delineating the manner of their investigations, and providing for their authority and oversight, it cannot be argued otherwise.¹¹⁵ Even recognizing these distinctions, however, the court insisted on making its erroneous analogy.

The analogy simply addresses the wrong question. The IC statute was designed to remove from the DOJ those investigations in which an actual or perceived conflict of interest exists.¹¹⁶ Broadly speaking, this requires determining who is fit to investigate and prosecute high-level executive branch officials. The critical issue under the statute, who is to prosecute, was simply ignored by the court. Instead the court assumed that the IC was the proper attorney for the job and characterized the issue as one of usual prosecutorial decision-making, entirely ignoring the jurisdictional issue. Regardless of the facts in *Tucker*, ordinary citizens are better protected by investigations and prosecutions conducted by the career professionals at the DOJ.¹¹⁷

The better analogy to draw is that of the power of a grand jury to investigate and indict. In many states, a grand jury’s jurisdiction and authority “is limited by the jurisdiction of the court of which it is an

¹¹² *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

¹¹³ *Id.*

¹¹⁴ *Id.* at 1316.

¹¹⁵ Several differences between ICs and regular prosecutors are discussed below. See *supra* Part IV.B.

¹¹⁶ See *supra* notes 30-33 and accompanying text.

¹¹⁷ See *supra* Part IV.B.

appendage.”¹¹⁸ Thus, a grand jury’s investigation¹¹⁹ or indictment¹²⁰ is reviewable on the ground that it was acting outside of its jurisdiction. For instance, in *State ex rel. Atkins v. Juvenile Court of Marion County*,¹²¹ an indictment was dismissed for lack of jurisdiction, the court holding that “[t]he grand jury’s power to indict is limited to the jurisdiction of the court of which it is an extension, so the grand jury was without jurisdiction to return the indictment in this case.”¹²² Furthermore, it has been recognized that such an objection may be raised at any time during the proceedings.¹²³

Clearly, then, whether a grand jury has sufficient jurisdiction to investigate or indict is reviewable and can warrant a dismissal if such jurisdiction is lacking.¹²⁴ This is exactly the issue presented in *Tucker*: whether the investigating body has jurisdiction enabling it to investigate. Thus, just as a grand jury’s determination of whether to investigate or indict is reviewable on jurisdictional grounds, an Attorney General’s referral decision should be policed in this manner. Depriving a defendant of this right to review could subject her to a loss of her liberty without any court even passing upon the question of whether the entity that took that liberty was empowered to do so. By potentially subjecting an ordinary person to IC investigation or prosecution without even the fundamental right of jurisdictional review, *Tucker* places the subject of such an investigation in an utterly powerless position.

¹¹⁸ *Hale v. Henkel*, 201 U.S. 43, 55 (1906) (citing *United States v. Hill*, 1 Brock. 156 (1809)); see also *Matter of Arawak Trust Co. (Cayman) Ltd.*, 489 F. Supp. 162, 164 (E.D.N.Y. 1980); *In re May 1972 San Antonio Grand Jury*, 366 F. Supp. 522, 530 (W.D. Tex. 1973); *State v. Funderburk*, 191 S.E.2d 520, 522 (S.C. 1972); 38 AM. JUR. 2D *Grand Jury* § 28 (1968); 38A C.J.S. *Grand Juries* § 80 (1996).

¹¹⁹ See *Cook v. Smith*, 834 P.2d 418, 422 (N.M. 1992) (stating that “[c]learly a grand jury cannot be convened to . . . investigate criminal conduct alleged to have occurred in another jurisdiction.”).

¹²⁰ See *State ex rel. Atkins v. Juvenile Court of Marion County*, 247 N.E.2d 53, 54 (Ind. 1969) (dismissing an indictment for lack of jurisdiction); *People v. O’Neill*, 53 N.Y.S.2d 945 (N.Y. Sup. Ct. 1945) (dismissing indictments for lack of jurisdiction); *People ex rel. Morrison v. Pollack*, 34 N.Y.S.2d 841 (N.Y. App. Div. 1942) (dismissing an indictment for lack of jurisdiction); *State v. Bond*, 204 S.E.2d 713 (N.C. Ct. App. 1974) (dismissing an indictment for lack of jurisdiction).

¹²¹ *State ex rel. Atkins v. Juvenile Court of Marion County*, 247 N.E.2d 53 (Ind. 1969).

¹²² *Id.* at 54.

¹²³ See *O’Neill*, 53 N.Y.S.2d at 947.

¹²⁴ See *supra* notes 119-23 and accompanying text.

2. *Legislative History Rationale*¹²⁵

The legislative history that the *Tucker* court relied upon regarding the reviewability of Attorney General decisions under the statute is much more persuasive than the prosecutorial discretion analogy drawn by the court in *Tucker*. However, even this rationale is not completely dispositive or convincing, because it is doubtful that Congress considered that referral jurisdiction would be invoked against ordinary citizens. The *Tucker* court examined the legislative history surrounding the 1987 reauthorization of the statute,¹²⁶ particularly those provisions pertaining to the review of Attorney General decisions made under the statute.¹²⁷ First, the court noted that the conferees explicitly endorsed, but did not codify, two holdings that precluded judicial review of an Attorney General's decision not to conduct a preliminary investigation.¹²⁸ The court noted:

The joint statement explained, however, that such a [senate] provision was not included in the jointly proposed legislation "because the conferees did not wish to suggest, by indicating a lack of judicial review of Attorney General decisions on preliminary investigations, that judicial review might be available of other Attorney General decisions under this chapter." . . . "[T]he conferees agree that an Attorney General's determinations under the independent counsel law are not subject to judicial review."¹²⁹

Indeed this paragraph, when read in isolation, seems to preclude judicial review of an Attorney General's decision to grant referral jurisdiction. However, the next sentence in the House report is very revealing, showing exactly what type of decisions the conferees had in mind. "[Nonreviewable Attorney General decisions] include[] such determinations as whether to investigate a person under 591(c), whether to

¹²⁵ See *United States v. Tucker*, 78 F.3d 1313, 1317-19 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

¹²⁶ See *supra* note 2.

¹²⁷ See *Tucker*, 78 F.3d at 1317-18.

¹²⁸ See *id.* at 1317. The two holdings referred to were *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986), and *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984). For further discussion of these cases, see H.R. CONF. REP. NO. 100-452, at 22 (1987), *reprinted in* 1978 U.S.C.C.A.N. 2185, 2188.

¹²⁹ *Tucker*, 78 F.3d at 1317-18 (quoting H.R. CONF. REP. NO. 100-452, *supra* note 128).

exercise recusal from a case, and whether to request appointment of an independent counsel.”¹³⁰ Vesting an independent counsel with jurisdiction is a far different matter than the examples set forth by the conferees. It is important to bear in mind that only the Special Division can vest an IC with original jurisdiction.¹³¹ The difference between granting original jurisdiction and referral jurisdiction is immaterial where the referral jurisdiction designates an entirely new party subject to investigation.

A close reading of the statute indicates that investigating an entirely new party is more suitably a matter of “expansion jurisdiction.”¹³² The expansion jurisdiction section provides that “[i]f the independent counsel discovers or receives information about possible violations of criminal law by persons as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General.”¹³³ This triggers a preliminary investigation, which can result in the expansion of jurisdiction by the Special Division, as the Attorney General does not have similar power to do so even if he decides an expansion is warranted.¹³⁴ Jurisdiction may also be expanded if the Attorney General fails to notify the Special Division within thirty days that more time for investigation is needed.¹³⁵ This provision precisely covers the situation in which evidence is discovered showing possible federal criminal acts by a person outside the grant of original jurisdiction, which presumably would be the case if an ordinary citizen were implicated by the evidence.¹³⁶ In contrast to the expansion jurisdiction section, which specifically mentions persons not covered by the original jurisdiction, the referral jurisdiction provision only covers referral of “matters.”¹³⁷ By vesting the power to expand jurisdiction exclusively in the Special Division, Congress clearly intended that a jurisdictional decision that significantly enlarges the scope of an IC

¹³⁰ H.R. CONF. REP. NO. 100-452, *supra* note 128, at 22.

¹³¹ See 28 U.S.C. § 593(b)(3) (1994); *supra* notes 47-51 and accompanying text.

¹³² See 28 U.S.C. § 593(c); *supra* note 51 and accompanying text. Of course, this argument was specifically rejected under the facts of *Tucker*. See *Tucker*, 78 F.3d at 1322.

¹³³ 28 U.S.C. § 593(c)(2).

¹³⁴ See *id.* § 593(c)(2)(C).

¹³⁵ See *id.*

¹³⁶ Of course, this argument turns on the breadth of the original jurisdiction. Thus, in cases like *Tucker*, with a very wide grant of original jurisdiction, even persons who are not specifically the subject of that original jurisdiction may nevertheless be covered by that jurisdiction for purposes of § 593(c)(2)(C)(ii).

¹³⁷ *Id.* § 594(e).

investigation is to be subject to judicial scrutiny. This rationale strongly supports allowing judicial review of a referral jurisdiction decision.

Finally, the *Tucker* court stated that “[t]he absence of judicial review of the discretionary referral decision merely allows the prosecution to proceed without the delay that judicial review inevitably would entail; it does not direct the outcome of the prosecution.”¹³⁸ This is perhaps the most limited interpretation of the IC’s jurisdiction in the entire decision. First, it ignores the practical impact of IC investigations, which often are devastating to the subject of the investigation.¹³⁹ Second, avoiding delay is hardly a sufficient rationale for potentially subjecting a defendant to a loss of liberty without a court passing upon whether the IC even has the authority to conduct an investigation. Finally, this statement simply ignores the importance of reviewing jurisdiction in our justice system. As Judge Woods stated in the district court opinion in *Tucker*:¹⁴⁰

Surely the Independent Counsel and Attorney General do not suggest that there can be no judicial review of prosecutorial jurisdiction of an independent counsel. If this were so, the Special Division would be virtually the only court in American jurisprudence, save the Supreme Court of the United States, whose decisions are subject to no judicial review whatsoever, regardless of whether those decisions are patently contrary to law. Such a precedent would be both novel and dangerous.¹⁴¹

However, despite these severe dangers, the court in *Tucker* chose the novel course of depriving any defendant subject to IC referral jurisdiction of the fundamental right to review.

B. Relatedness

The Eighth Circuit’s overly generous reading of the relatedness requirement of referral jurisdiction in *Tucker* ignored both legal precedent and policy considerations. The relatedness requirement was specifically addressed by the United States Supreme Court in *Morrison v. Olson*,¹⁴²

¹³⁸ *United States v. Tucker*, 78 F.3d 1313, 1319 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

¹³⁹ *See infra* Part IV.B.

¹⁴⁰ *United States v. Tucker*, 898 F. Supp. 654 (E.D. Ark. 1995), *rev’d*, 78 F.3d 1313 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

¹⁴¹ *Id.* at 659.

¹⁴² *Morrison v. Olson*, 487 U.S. 654 (1988).

wherein the Court addressed the meaning of relatedness for the purposes of establishing the original jurisdiction of an IC.¹⁴³ Although this portion of the opinion is not a model of clarity, some reference is made to relatedness for referral jurisdiction purposes. The *Tucker* court ignored the restrictive view of relatedness set forth by the Supreme Court in *Morrison v. Olson*. Additionally, the *Tucker* court ignored the practical characteristics of ICs and their investigations that set them apart from normal criminal prosecutions. Specifically, the loose relatedness interpretation by the *Tucker* court ignores the original purpose of the IC statute and the factors associated with IC investigations that essentially make them unfair when applied to ordinary citizens. These factors include extremely costly investigations and prosecutions, a lack of accountability, and the devastating impact an IC investigation can have even in the absence of an indictment.¹⁴⁴

1. *The Morrison v. Olson Relatedness Formulation*

In *Morrison v. Olson*, the Supreme Court settled questions pertaining to the IC statute's constitutionality.¹⁴⁵ One of the issues resolved in this case was whether "the powers vested in the Special Division by the Act conflict with Article III¹⁴⁶ of the Constitution."¹⁴⁷ In holding that there is no conflict, the Court first discussed the power of the Special Division to appoint an IC and define her jurisdiction.¹⁴⁸ Recognizing that Congress "may vest the power to define the scope of the office in the court as an incident to the appointment of the officer pursuant to the Appointments Clause,"¹⁴⁹ the Court nonetheless imposed a fairly restrictive limit on the Special Division's determination of jurisdiction:

In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court

¹⁴³ See *id.* at 677-81.

¹⁴⁴ See *infra* notes 151-55 and accompanying text for a discussion of cost considerations, *infra* notes 165-74 and accompanying text for a discussion of an IC's lack of accountability, and *infra* notes 175-82 and accompanying text for a discussion of the impact of an IC investigation.

¹⁴⁵ See *Morrison*, 487 U.S. at 677-81.

¹⁴⁶ U.S. CONST. art. III.

¹⁴⁷ *Morrison*, 487 U.S. at 677.

¹⁴⁸ See *id.*

¹⁴⁹ *Id.* at 679.

decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.¹⁵⁰

In a footnote to this sentence, the Court imposed the same limitation on the Special Division's power "to expand the jurisdiction of the counsel upon request of the Attorney General under § 593(c)(2)."¹⁵¹ Clearly the *Morrison* Court recognized the importance of limiting the jurisdiction of an IC to the facts that originally gave rise to her appointment.

The Court then listed the other duties of the Special Division, including the power to grant referral jurisdiction.¹⁵² In commenting on the referral jurisdiction section in a footnote, the Court stated:

In our view, this provision does not empower the court to expand the original scope of the counsel's jurisdiction; that may be done only upon request of the Attorney General pursuant to § 593(c)(2). At most, § 594(e) authorizes the court simply to refer matters that are "relate[d] to the independent counsel's prosecutorial jurisdiction" as already defined.¹⁵³

The defendants in *Tucker* argued that this language shows an intent by the Supreme Court that any grant of referral jurisdiction must be demonstrably related to the original grant of prosecutorial jurisdiction.¹⁵⁴ This argument is very persuasive. It is clear from the excerpted footnote that the Supreme Court was addressing the furthest limit of the Special Division's power to grant referral jurisdiction. The introductory language "[a]t most"¹⁵⁵ clearly evinces that the Court was discussing a limitation. Then the quoted material distinguishes between expansions of jurisdiction and referrals of jurisdiction. Given the above distinction that expanded jurisdiction specifically relates to "persons," while referral jurisdiction is only concerned with "matters," it is arguable that the Court intended to restrict the authorization of an investigation of an entirely new person.¹⁵⁶

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 679 n.17.

¹⁵² *See id.* at 680.

¹⁵³ *Id.* at 680 n.18 (quoting 28 U.S.C. § 594(e) (1994)).

¹⁵⁴ *See United States v. Tucker*, 78 F.3d 1313, 1320 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1997).

¹⁵⁵ *Morrison*, 487 U.S. at 680 n.18.

¹⁵⁶ *See supra* notes 121-24 and accompanying text.

Of course, this argument was rejected by the Eighth Circuit in *Tucker*, which held that relatedness for an Attorney General's referral decision¹⁵⁷ depends merely on "the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred."¹⁵⁸ The court stated that if the demonstrably related requirement were imposed, "referral would never be necessary and section 594(e) would be superfluous."¹⁵⁹ Arguably, a less restrictive requirement of relatedness renders referral jurisdiction even more superfluous, because that requirement will nearly always be satisfied.

Legislative history as to the meaning of "relatedness" within § 594(e) is scarce. Originally, the stated purpose of § 594(e) was to recognize that "once a special prosecutor is appointed and actively involved in conducting a criminal investigation, the case he is pursuing may develop information with regard to related criminal matters."¹⁶⁰ Clearly this is not very helpful in determining the exact definition of "relatedness" for referral jurisdiction purposes. Given the restrictive view of jurisdictional grants by the *Morrison v. Olson* Court, however, a mere procedural and factual link is clearly too loose of a connection.¹⁶¹ Additionally, the practical considerations listed below compel a much more restrictive interpretation of relatedness.

2. The Original Purpose of the IC Statute

As discussed above, the original purpose of the IC statute had nothing to do with investigating ordinary citizens. Yet, the expansive "relatedness" definition by the court in *Tucker* allows exactly that. Various practical considerations combine to show the devastating effect an IC investigation or prosecution could have on an ordinary citizen. Most importantly, however, the investigation by an IC of an ordinary citizen simply is not what was originally intended by Congress. As stated above,¹⁶² the purpose

¹⁵⁷ This holding, when combined with *Morrison v. Olson*, sets up two different formulations of relatedness for referral jurisdiction purposes. The first, which requires demonstrable relatedness, only applies to situations in which the Special Division is granting referral jurisdiction. *Tucker*, 78 F.3d at 1321. "This contrasts with the Attorney General's broader referral power, which is not constrained by separation-of-powers concerns." *In re Espy*, 80 F.3d 501, 507 (D.C. Cir. 1996).

¹⁵⁸ *Tucker*, 78 F.3d. at 1321.

¹⁵⁹ *Id.*

¹⁶⁰ S. REP. NO. 95-170, *supra* note 9, at 69.

¹⁶¹ *Morrison*, 487 U.S. at 679.

¹⁶² See *supra* notes 28-31 and accompanying text.

of the Ethics in Government Act and its special prosecutor provisions was to restore public faith in the federal government. It can scarcely be argued that an IC's investigation of an ordinary citizen is so weighty a matter of public concern that it implicates our faith in governmental institutions.

This fundamental flaw in *Tucker* is readily apparent when considering the specific purpose of the creation of the IC statute. As noted above,¹⁶³ the statute was meant to cure any conflict of interest created when the DOJ investigates high-level executive branch officials. "Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers."¹⁶⁴ Such a conflict simply does not exist when an IC investigates an ordinary citizen, unless that citizen is so inextricably linked with a covered individual that the catch-all provision, § 591, applies. However, such situations are few and far between.

In fact, the statute has been incessantly criticized on the ground that it covers too many individuals.¹⁶⁵ According to one-time independent counsel Joseph diGenova (who investigated Clinton's passport file in 1992), "[t]here is no reason to cover anybody outside the Justice Department."¹⁶⁶ Although the list of covered persons has never been shortened,¹⁶⁷ such criticism continues. Similarly, attempts to extend coverage to members of Congress have failed because "no inherent conflict exists in its prosecuting Members of Congress."¹⁶⁸ Clearly, investigating alleged crimes by members of Congress implicates public faith in governmental institutions. If such investigations are not serious enough to warrant an IC investigation, then ordinary citizens, who likewise create no DOJ conflict of interest, should not be subject to an IC investigation.

An IC is a specifically created officer to cure a specific problem. If that problem does not exist, an IC should not be appointed. Nevertheless, this is exactly what occurs when an IC encounters evidence of alleged federal crimes by ordinary citizens outside the range of his prosecutorial jurisdiction. Even if those ordinary citizens are public figures, investigating them is better left to the career professionals at the DOJ. In fact, the Public

¹⁶³ See *supra* notes 28-31 and accompanying text.

¹⁶⁴ *Morrison*, 487 U.S. at 677.

¹⁶⁵ See O'Sullivan, *supra* note 34, at 475-80; Jost, *supra* note 2, at 30.

¹⁶⁶ Jost, *supra* note 2, at 30.

¹⁶⁷ Amendments aimed at reducing the number of covered officials have been proposed, but none have been adopted. See S. REP. NO. 103-101, *supra* note 34, at 19.

¹⁶⁸ *Id.* at 18.

Integrity Section of the DOJ was specifically created to handle investigations of a sensitive public nature.¹⁶⁹ ICs often load their offices with DOJ personnel because “‘Justice detailees provide a ready source of the cost-effective, up-to-date and experienced personnel that independent counsels need for a quick and solid performance.’”¹⁷⁰ This fact underscores the notion that “Congress would essentially like – but does not require – that IC investigations proceed as a DOJ investigation”¹⁷¹ Thus, when an investigation can proceed in the DOJ, given a minimal factual connection and minimal public perception of a conflict of interest, it should. However, *Tucker* dangerously allows such investigations to fall within an IC’s jurisdiction, without any judicial review.

3. Cost Considerations

Perhaps the most distinguishing characteristic of an IC investigation is its often enormous expense. For instance, the length and breadth of the Whitewater investigation, including the *Tucker* prosecutions, have made it extremely expensive.¹⁷² This is not a new phenomenon. Historically, IC investigations have come at a high premium. While some IC investigations have been cut short without an indictment, resulting in low total costs,¹⁷³ most investigations end up costing taxpayers millions of dollars.¹⁷⁴ Before Whitewater, the most expensive IC investigation was Iran-Contra, which cost taxpayers \$40 million over a seven-year period.¹⁷⁵ While no one can reasonably doubt the seriousness of Iran-Contra, the \$40-million-dollar price tag does indicate that ICs may abuse their available resources.

¹⁶⁹ See EASTLAND, *supra* note 12, at 147 n.8.

¹⁷⁰ O’Sullivan, *supra* note 34, at 469 (quoting S. REP. NO. 103-101, *supra* note 34, at 25-26).

¹⁷¹ *Id.* at 470.

¹⁷² See *Whitewater Probe Surpasses \$30-Million*, TIMES-PICAYUNE (New Orleans), Oct. 6, 1997, at A2 (citing a General Accounting Office report that the Whitewater investigation cost over \$30 million); *Starr Runs Up \$30 Million Tab in Clinton Probe*, THE BUFFALO NEWS, Oct. 1, 1997, at 6A (citing the same General Accounting Office report).

¹⁷³ See S. REP. NO. 103-101, *supra* note 34, at 13-14 (indicating that some investigations have actually been very low-cost, in the range of \$3330 to \$17,000).

¹⁷⁴ See *id.*

¹⁷⁵ See O’Sullivan, *supra* note 34, at 502 (stating that the real cost of the \$40 million for the investigation, including IC probe and “the cost to various government agencies of complying with document requests and subpoenas,” was \$100 million).

Additionally, the resources available to an IC are virtually limitless.

In the conduct of the investigation, the IC holds a blank check. . . . An IC is the only prosecutor in the country who is by statute entitled to call upon all the vast resources of the federal government without providing any justification, without assuming responsibility for funding shortfalls, and without worrying about competing demands upon available resources.¹⁷⁶

In the face of such enormous resources, the costs associated with defending a client who is the subject of an IC investigation have skyrocketed.¹⁷⁷ The IC investigation of Theodore B. Olson (which spawned *Morrison v. Olson*) not only cost the taxpayers \$1 million, but Olson spent \$1 million in attorneys' fees to defend himself.¹⁷⁸ Other investigations have necessitated very high defense costs, ranging from \$223,186.66 for a "minor" IC investigation¹⁷⁹ to \$754,449.50 for President Reagan's fees associated with Iran-Contra.¹⁸⁰

Congress has specifically addressed the problem of exorbitant defense fees. In the 1994 amendments¹⁸¹ to the IC statute, Congress imposed various cost-saving and -controlling measures. These amendments required "independent counsels to act with due regard for expense; to authorize only reasonable and lawful expenditures; and to appoint a staff person to track expenses and function as a 'certifying official' with personal liability for authorizing improper expenditures."¹⁸² The purpose of these cost controls was "to bring independent counsel expenditures in line with spending by other federal prosecutors."¹⁸³ Of course, given the current cost of the Whitewater investigation, the efficacy of these provisions is in doubt.

¹⁷⁶ *Id.* at 483.

¹⁷⁷ *See, e.g., In re North*, 94 F.3d 685 (D.C. Cir. 1996); *In re Mullins*, 84 F.3d 459 (D.C. Cir. 1996).

¹⁷⁸ *See* Thomas S. Martin, *Independent Counsel - Checks and Balances*, 58 GEO. WASH. L. REV. 536, 538 (1990).

¹⁷⁹ *In re Mullins*, 84 F.3d 459, 461 (D.C. Cir. 1996). The attorneys' fees resulted from an investigation of President Clinton's passports and private files to determine if he had renounced his U.S. citizenship for that of dual citizenship with Great Britain in order to avoid the draft during the Vietnam War. *See id.* at 461-63.

¹⁸⁰ *See In re North*, 94 F.3d 685 (D.C. Cir. 1996).

¹⁸¹ *See supra* note 2.

¹⁸² S. REP. NO. 103-101, *supra* note 34, at 24. This quoted portion of legislative history was codified at 28 U.S.C. § 594(f) (1994).

¹⁸³ S. REP. NO. 103-101, *supra* note 34, at 24.

Perhaps the most notable recognition by Congress of the exorbitant costs involved in IC investigations is found in the 1983 amendments.¹⁸⁴ The statute was amended to allow “reimbursement for those reasonable attorneys’ fees incurred by [the defendant] during [the] investigation”¹⁸⁵ when no indictment is returned. The purpose in creating this provision was to “remedy the rare situation in which a high government official is unfairly subjected to a more rigorous application of criminal law than other citizens.”¹⁸⁶ Unfortunately, *Tucker* subjects normal citizens to this “more rigorous application of criminal law.” Given the enormous cost of defending against an IC investigation as compared to a regular DOJ investigation, subjecting ordinary citizens to IC investigation or prosecution is simply unfair. The DOJ can do the job more quickly, for less taxpayer cost, and for much less cost to the defendant, while still effectively enforcing the law.

4. *Accountability*

Another often-encountered criticism of the IC statute is that ICs are not sufficiently accountable. As shown above,¹⁸⁷ ICs have virtually limitless resources upon which to draw in conducting their investigation or prosecution. Additionally, broad jurisdictional grants, such as that involved in *Tucker*,¹⁸⁸ vest with an IC enormous amounts of discretion as to where, how, and for how long such resources may be employed.

Given the IC’s vast powers and potentially wide-ranging jurisdiction, as well as the incentives for him to employ both to the fullest, there obviously exists the potential for abuses of the IC mechanism. For example, the unlimited budget accorded ICs can be exploited far beyond the limits of reasonableness.¹⁸⁹

If the IC mechanism can be abused when applied to public figures covered by the statute, the possibility of abuse against an ordinary citizen subjected to an IC probe under *Tucker* would be particularly great.

¹⁸⁴ See *supra* note 2.

¹⁸⁵ 28 U.S.C. § 594(f) (1994).

¹⁸⁶ S. REP. NO. 103-101, *supra* note 34, at 20.

¹⁸⁷ See *supra* note 154 and accompanying text.

¹⁸⁸ See *supra* note 83 and accompanying text.

¹⁸⁹ O’Sullivan, *supra* note 34, at 493.

The argument that ICs suffer from a lack of accountability in part ignores the purpose of the IC statute. The special prosecutor provisions of the Ethics in Government Act were specifically designed to insure that an IC is not accountable to the Executive branch.¹⁹⁰ However, many have argued, pointing to the virtually meaningless removal provisions of the statute, that ICs are too independent.¹⁹¹ An IC is subject to removal only by the Attorney General,¹⁹² and that possibility is virtually the only Executive Branch control of the IC once he or she is appointed. Originally the statute allowed removal only for "extraordinary impropriety."¹⁹³ However, the 1983 Amendments¹⁹⁴ altered this requirement to allow for removal "only for good cause."¹⁹⁵ This provision has been criticized as being "somewhat like referring to shackles as an effective means of locomotion."¹⁹⁶ "While the Attorney General may be dismissed at will by the President or impeached by Congress; a regulatory IC can be removed; and line DOJ prosecutors can be fired, sanctioned, or overruled if they abuse the powers of their office, the IC, once appointed, is practically untouchable."¹⁹⁷

Imagine the consequences of allowing an unaccountable IC to wield this authority against an ordinary citizen. In discussing this lack of accountability, one particularly insightful observer has stated:

The potential for abuse of power is exceeded only by the near certainty of unequal treatment. Even if the IC does not abuse his powers in the sense of employing them for improper purposes, it is likely that the target of the investigation will be subjected to scrutiny that is longer, more intensive, more invasive and more public than that which the average citizen would suffer.¹⁹⁸

Tucker allows this scrutiny to be brought against an average citizen.¹⁹⁹ In the case of a covered official these concerns are generally outweighed by

¹⁹⁰ See *supra* notes 4, 30-33 and accompanying text.

¹⁹¹ See generally Jost, *supra* note 2.

¹⁹² See 28 U.S.C. § 596(a)(1) (1994).

¹⁹³ *Id.* § 596(a)(2) (1978).

¹⁹⁴ See *supra* note 2.

¹⁹⁵ 28 U.S.C. § 596(a)(1). In addition, the 1994 Amendments, see *supra* note 2, allow for removal due to "physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.*

¹⁹⁶ *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

¹⁹⁷ O'Sullivan, *supra* note 34, at 494.

¹⁹⁸ *Id.* at 493.

¹⁹⁹ See *United States v. Tucker*, 78 F.3d 1313 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

the need for public information and accountability of average citizens to the general public. However, if an ordinary citizen is subject to IC prosecution, it is doubtful that the balance would be the same. Unless that citizen is so inextricably linked with a covered official as to create a legitimate conflict of interest, an IC investigation of him would clearly be an unconscionable burden on his rights and privacy. Thus, the potential for abuse inherent in any IC investigation, when coupled with an extreme lack of accountability, renders an IC investigation or prosecution of an ordinary citizen patently unfair.

5. *The Impact of an IC Investigation*

An IC investigation that does not result in either an indictment or formal prosecution can nevertheless be terribly damaging to the investigated party. In addition to the cost and accountability problems discussed above, IC probes have built-in characteristics that cause them to be particularly damaging. The IC statute is often criticized as inherently biased towards prosecution, although impartiality of investigation is more appropriate.²⁰⁰ Indeed, the alteration from "special prosecutor" to "independent counsel" was meant to "reduce the stigma of, and remove the Watergate connotation from, a special prosecutor investigation and to more accurately describe the purpose of appointing an individual to conduct an investigation."²⁰¹ Clearly Congress recognized "that an independent counsel is 'subject to formidable public – and perhaps self-imposed – pressure to indict in the one case he was appointed to pursue.'"²⁰²

Aside from the pressure to indict, the reporting requirements of the IC statute may damage beyond repair the reputation of the subject of the investigation, particularly if that subject is an ordinary citizen. At the conclusion of an IC investigation, the IC is required under the statute to issue a final report "setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought."²⁰³ That report is submitted to the Special Division, which then

²⁰⁰ See generally O'Sullivan, *supra* note 34.

²⁰¹ S. REP. NO. 97-406, at 19-20 (1982), reprinted in 1982 U.S.C.C.A.N. 3537, 3555-56.

²⁰² Martin, *supra* note 178, at 537 (quoting former Attorney General Edward Levi, *Provision for Special Prosecutor: Hearings on H.R. 14,476, H.R. 11,357, H.R. 11,999, H.R. 8281, H.R. 8039, H.R. 15,634, and Title I of S. 495 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 35 (1976)*).

²⁰³ 28 U.S.C. § 594(h)(1)(B) (1994).

has the authority to “release to the Congress, the public, or any appropriate person, such portions of a report made under this subsection as the division of court deems appropriate.”²⁰⁴ “One anomaly directly arising out of the report mandate is that an individual against whom criminal charges are not brought, nonetheless, can be publicly branded a criminal or wrongdoer”²⁰⁵ Even in the absence of this report, “the sound and fury surrounding the appointment of an IC creates a public sense that there is something to an allegation – even though the referral itself means nothing of the sort given the low statutory trigger.”²⁰⁶

These disclosure requirements run counter to longstanding notions of fundamental fairness in criminal investigatory proceedings. In fact, the substance of grand jury investigations is specifically deemed to be private, and any disclosures thereof are explicitly forbidden by the Federal Rules of Criminal Procedure²⁰⁷ and by DOJ policy.²⁰⁸ The clear intent of such a prohibition, at least in part, is to avoid any stigma of criminality when the defendant is in fact innocent. However, Congress imposed mandatory reporting requirements upon an IC. In the case of an IC investigation brought to bear against an ordinary citizen under *Tucker*, the need for public dissemination is nonexistent. Yet, even in this situation the IC statute would require the issuance of a final report. Clearly, this requirement is just one of the many distinguishing features of ICs and their investigations that should preclude their use against ordinary citizens.

CONCLUSION

Although the IC statute was based on a long-recognized principle that became salient during Watergate, the implementation of the statute has shown that it is fraught with imperfections. The IC statute is very controversial; despite nearly twenty years of implementation, its boundaries and parameters still are not entirely clear. An additional complexity was introduced by the *Tucker* decision, which seemingly allows ICs to investigate ordinary citizens based on a very broad interpretation of referral jurisdiction. Clearly, such an investigation directly contravenes the intent and purpose of the IC statute as originally enacted and implemented. Perhaps even more dangerous than allowing such an investigation, the

²⁰⁴ *Id.* § 594(h)(2).

²⁰⁵ Martin, *supra* note 178, at 546-47.

²⁰⁶ O’Sullivan, *supra* note 34, at 501.

²⁰⁷ See FED. R. CRIM. P. 6(e).

²⁰⁸ See O’Sullivan, *supra* note 34, at 484 n.76.

Tucker court deprived citizens of a right to judicial review when the vast resources of an IC are brought against him. The result is obvious; the great authority and power of a statutory IC can easily and irreversibly be brought against normal citizens. This precedent is especially alarming in light of the enormous cost of such an investigation, the lack of accountability of an IC, and the damage to reputation that such an investigation causes. Thus, *Tucker* represents an affront to the fair and equitable administration of our criminal justice system.

